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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6584

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COUFT OF MISSOURI

JURISDICTIONAL STATEMENT

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Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

The appellant, Linda Mae Trapp, appeals from the judgment of the Supreme Court of Missouri en banc, entered on January 15, 1980, affirming an order of the juvenile court below overruling appellant's motions to set aside the juvenile court's custody order of January 2, 1973, and its support order of February 27, 1973. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Missouri en banc is reported in 593 S.W.2d 193. A copy of said opinion is attached hereto as Appendix A. In re Trapp, 528 S.W.2d 485 (Mo.App. 1975), is a related case.

JURISDICTION

This case was originally commenced in the juvenile division of the Circuit Court of Henry County, Missouri, on December 19, 1972, by the filing of a petition by the juvenile officer under §211.031 RSMo 1969 to have the juvenile court take jurisdiction of appellant's four minor children (Robert Emery Trapp, DOB 1-9-68; Sheryl Ann Trapp, DOB 4-25-69; Dee Ann Trapp, DOB 4-7-70; and Duane Edwin Trapp, DOB 9-8-72) as being in need of care and treatment under the supervision of the court.

A hearing was had on the petition on January 2, 1973, and thereupon the juvenile court entered an order of custody under §211.181 RSMo 1969, finding the children to be neglected children within the

meaning of the law, making them wards of the court, and vesting their care, custody, and control in the Welfare Department of Henry County, Missouri, until further order of the court.

Although no appeal was taken from the custody order, a number of additional proceedings have ensued in the case. On October 28, 1975, the juvenile court entered an order returning custody of appellant's eldest child, Robert, to her and her husband, and his custody is therefore not involved in this appeal.

On May 22, 1978, appellant filed a motion (Tr. 10-14) to set aside the custody order of January 2, 1973, and to dismiss the neglect petition. Therein appellant alleged (Tr. 12-14) that said order is null and void for the reasons, inter alia, that:

"C. [The juvenile court] was without jurisdiction to enter the custody order of January 2, 1973, because the statutes (§§211.031 and 211.181 RSMo 1969) on which said order was based are unconstitutional on their face and as applied because they operate to permit parents to be deprived of their fundamental liberty or right to the immediate companionship, care, custody, and management of their minor children in violation of the Due Process Clause of the Fourteenth Amendment in that:

"(1) The standards of 'proper support . . . or other care necessary for [the child's] well-being,' embodied in §211.031(1)(a); of 'otherwise without proper care, custody or support,' in §211.031(1)(b); and of 'behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others,' in §211.031(1)(c), are unconstitutionally vague and overbroad because: (a) They do not, and did not here, give fair warning of what parental conduct is proscribed; (b) They permit, and permitted here, arbitrary and discriminatory separation of the child from the parents; and (c) They inhibit parents from freely and fully exercising their fundamental 'liberty' and 'privacy' rights in maintaining the integrity of their family and the rearing of their children.

"(2) The statutes (§§211.031 and 211.181 RSMo) are also unconstitutional on their face and as applied because they deny the parents substantive due process of law in that: (a) They do not require the State to balance its child-protection interest against the parents'

countervailing interest in being able to raise their children in an environment free from governmental interference; (b) They do not require the State to show by clear and convincing evidence that the child is subjected to a real and substantial degree of harm and that more harm is likely to befall the child by being permitted to remain with his parents than by being separated from them, so as to give the State the compelling state interest necessary to justify depriving the parents of the fundamental right to the custody of their children; and (c) They are not narrowly tailored to achieve only the State's compelling state interest in that they do not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in the home, before resorting to separation of the child from the parents."

On May 30, 1978, appellant filed a motion (Tr. 15-17) to set aside the child support order entered by the juvenile court on February 27, 1973. Therein appellant alleged (Tr. 15) that said order is null and void for the reason , inter alia, that:

"A. [The juvenile court] was without jurisdiction under §211.241 RSMo 1969 to enter the support order of February 27, 1973, because the jurisdictionally prerequisite [custody] order of January 2, 1973, . . . was null and void for the reasons set forth in [appellant's] motion to set aside the custody order of January 2, 1973, which was filed herein on May 22, 1978 . . .."

On September 25, 1978, the juvenile court rejected the constitutional challenges to the statutes and entered an order overruling appellant's motion to set aside the custody order of January 2, 1973, and the child support order of February 27, 1973. On January 15, 1980, the Missouri Supreme Court entered its judgment affirming the juvenile court's order of September 25, 1978, upholding the constitutionality of the statutes. A copy of said judgment is attached hereto as Appendix B.

A timely motion for rehearing was filed, and said motion was overruled on February 11, 1980, by an order of the Missouri Supreme Court which is attached hereto as Appendix C.

Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Missouri on February 26, 1980, and a

copy thereof is attached hereto as Appendix D.

Jurisdiction of this appeal is conferred on this Court by the provision of 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914); Charleston Federal Savings & Loan Ass'n. v. Alderson, 324 U.S. 182, 185-186 (1945); Raley v. Ohio, 360 U.S. 423, 436 (1959).

STATUTORY PROVISIONS INVOLVED

Sections 211.011, 211.031, 211.041, 211.091, 211.101, 211.171, 211.181, 211.241, 211.251 and 211.261 of the Revised Statutes of Missouri (RSMo) 1969, are set forth in Appendix E hereto.

QUESTIONS PRESENTED

I.

Are the Missouri parental neglect statutes (§§211.031 and 211.181 RSMo 1969) on which the juvenile court depended for its jurisdiction to enter the custody order of January 2, 1973, and the child support order of February 27, 1973, unconstitutional on their face and as applied because they operate to permit parents to be deprived of their fundamental liberty or right to the immediate companionship, care, custody, and management of their minor children in violation of the Due Process Clause of the Fourteenth Amendment in that:

A. The neglect standards embodied in §211.031(1)(a,b,c) —"proper support . . ., medical, surgical or other care necessary for [the child's] well-being," "otherwise without proper care, custody or support," and "behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others" — are unconstitutionally vague and overbroad because: (1) They do not give fair warning of the parental conduct proscribed; (2) They permit arbitrary and discriminatory separation of the child from the parents; and (3) They inhibit the exercise of the parents' "liberty" and "privacy" rights in maintaining the integrity of their family and rearing their children?

B. The statutes (§§211.031 and 211.181 RSMo) are unconstitutional on their face and as applied because they deny substantive due process in that they do not require the State to balance its

child-protection interest against the strong countervailing interest of the parents, to wit: (1) The statutes do not require the State to show by clear and convincing evidence that the child is imminently subject to a substantial risk of suffering serious harm due to the culpable conduct of his parents and that more harm is likely to befall the child by being permitted to remain with his parents than by being separated from them, so as to give the State the compelling state interest necessary to justify depriving the parents of the fundamental right to the custody of their children; and (2) the statutes are not narrowly tailored to achieve only the State's compelling state interest in that they do not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in the home, before resorting to separation of the child from the parents?

II.

Was the neglect petition insufficient to vest the juvenile court with jurisdiction to enter the custody order because the petition merely alleged neglect in the conclusory language of §211.031 RSMo 1969 and thus violated the requirement of §211.091 RSMo 1969 and of the Due Process Clause of the Fourteenth Amendment that such a petition must set forth the alleged factual basis for the proceeding?

III.

Is the custody order of January 2, 1973, constitutionally invalid and void because there was a total absence of competent and substantial evidence to support the juvenile court's finding of neglect, and said order therefore deprived appellant of her fundamental right to the immediate companionship, care, custody, and management of her children in violation of Due Process Clause of the Fourteenth Amendment?

IV.

Was appellant deprived of her fundamental right to the custody of her children without procedural due process of law in that the standard of proof of alleged neglect required by the statutes (§211.031 and 211.181 RSMo 1969) was a mere preponderance of the evidence rather than at least "clear and convincing" evidence?

V.

Does the juvenile court's finding in the custody order that the children were "neglected children within the meaning of the law and in need of care and protection," satisfy the due process requirement of the Fourteenth Amendment that the juvenile court must accompany its order with a statement of the reasons or considerations therefor, and set forth the basis for the order with sufficient specificity to permit meaningful review?

VI.

Is the juvenile court's child support order of February 27, 1973, invalid and void because the court was without jurisdiction to enter the order under §211.241 RSMo 1969 because the jurisdictionally prerequisite custody order of January 2, 1973, finding the children to be within the purview of the provisions of §211.031 RSMo 1969, was null and void for the reasons set forth in Question I(A,B) aforesaid?

VII.

Is the child support order of February 27, 1973, invalid because it was entered without notice and an opportunity to be heard on the issue of a monetary judgment for support of the children, and it thus deprived appellant of her property in violation of the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

As previously indicated, this case was originally commenced on December 19, 1972, when the juvenile officer of Henry County, Missouri, filed in the Juvenile Court of Henry County a printed form petition (Tr. 2) alleging in the language of §211.031 RSMo 1969 (See App. E, p. 1) that appellant's four children were under the age of 17, physically present in Henry County, Missouri, and in need of care and treatment under the supervision of the court because:

> "(a) The parents or other persons legally responsible for the care and support of the child have neglected and refused to provide proper support, education which is required by law, medical, surgical or other care necessary for the well being of said child.
>
> (b) Said child is otherwise without care, custody or support.

(c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others."

On December 22, 1972, the juvenile court (Judge Kelso Journey) entered a temporary order (Tr. 2b), dated December 18, 1972, finding that the facts alleged in the juvenile officer's neglect petition were true and "that the best interests of said children require" that the Division of Welfare be given temporary custody of the children. Accordingly, the court granted temporary custody of the four children to the Division of Welfare and ordered that a hearing on the neglect petition be held on January 2, 1973, and that the parents be notified and summoned to appear.

Service of summons was had upon appellant but not upon her husband, and thereafter on January 2, 1973, Judge Journey entered the following order of custody under §211.181 RSMo 1969 (See App. E, pp. 2-3):

"Comes now Morran D. Harris, Juvenile Officer, and comes Linda Mae Trapp in person, and she being without funds to employ an attorney, the Court assigned George Lilleston to act as attorney for her and he appears, as well as Bill Edmonds, Child Welfare Aide, and Dr. Coleberd and associate physician and evidence is heard on the petition herein. The Court finds the four children herein are neglected children within the meaning of the law and are in need of the care and protection of the State of Missouri and are hereby made wards of this Court until further order. Said children's care, custody and control is hereby vested in the Welfare Department of Henry County, Missouri, until further order of this Court."

No stenographic notes or recording were requested or made of the hearing on January 2, 1973. However, as disclosed in the transcript of the subsequent proceedings to terminate parental rights in the related case of In re Trapp, 528 S.W.2d 489 (Mo.App. 1975), the matter of the testimony given at the neglect hearing on January 2, 1973, was fully covered at the trial of the termination case herein on April 29, 1974, at which both Dr. Coleberd and Mr. Edmonds testified. Said transcript, which was filed with the Missouri Supreme Court as an exhibit in this case, will hereinafter be referred to as "ExhTr."

From the opinion and transcript in that case, it appears that on August 10, 1972, Mrs. Trapp contacted the Henry County Welfare office seeking public assistance and employment for her husband. (ExhTr. 78) Mr. Trapp had been unemployed for some time except for occasional employment on Sundays at a filling station at $1.00 an hour. Mrs. Trapp was employed by Rival Manufacturing, but would have to quit soon because her doctor had advised her that her fourth child was due at any time. (ExhTr. 78-79) It was explained to her that since her husband was employable, and even though he could not find employment, she would not be eligible for Aid to Dependent Children or general relief so long as he was present in the home. (ExhTr. 78) Mrs. Trapp was then referred to the service worker who suggested that Mr. Trapp continue to make contact with a Mrs. Fletcher at "West Central" in regard to locating a job. (ExhTr. 78-79)

On September 8, 1972, the child, Duane Edwin Trapp, was born to Mr. and Mrs. Trapp at Golden Valley Hospital in Clinton, Missouri.

On October 20, 1972, Mrs. Trapp reapplied for Aid to Dependent Children, representing that Mr. Trapp left her a few days before the baby was born and that his whereabouts were unknown. Her immediate need was for food and she was given commodities. (ExhTr. 73, 76-77, 80-81)

On October 27, 1972, Mrs. Trapp's application for Aid to Dependent Children was approved at $158 per month. She subsequently received checks in that amount for November and December, 1972. (ExhTr. 79, 81)

Mr. Bill Edmonds testified that on November 2, 1972, Mrs. Trapp came to the welfare office in Clinton, Missouri, seeking food for her family and medical attention for the baby, Duane. Mr. Edmonds got a grocery order for her and followed her out to her home in Montrose, Missouri, where they picked up the baby and brought it back to the hospital in Clinton. (ExhTr. 36, 39) Mr. Edmonds testified that the baby couldn't keep any food down and that, as he recalled (on April 29, 1974), the illness the baby had on November 2, 1972, was "dehydration." (ExhTr. 37) In his written report made in November 1972 and introduced at the trial on April 29, 1974, in a folder marked Exhibit 2 (ExhTr. 33), Mr. Edmonds stated: "Dr. Coleberd

was the physician who attended the child and it was his opinion that the child was sick because Mrs. Trapp had changed the [baby's] formula. It seems that the child would not keep anything on its stomach and also had some diarrhea. Dr. Coleberd made a prescription to correct this and instructed the mother to keep the child on one particular formula."

The baby was not hospitalized. Mr. Edmonds testified that he picked up the prescription and took Mrs. Trapp and the baby back home that evening on November 2, 1972. (ExhTr. 40-41) Mr. Edmonds noted that the home in Montrose was a four-room house, that it was being heated only by a small Coleman cooking stove, and that the three older children (then 2, 3, and 4 years old) were inside the house dressed only in undershorts, although the weather outside was beginning to turn cold. (ExhTr. 38-39)

The case was first brought to the attention of the juvenile authorities by Dr. James C. Coleberd after seeing the oldest child, Robert, in the hospital in Clinton on December 15, 1972. Robert, who was then four years old, had been brought to the emergency department by his mother. He had been ill for two weeks, but Mrs. Trapp had not been aware of any pneumonia until she took him to the hospital. She had been unable to go sooner due to impassable roads. Examination by Dr. Coleberd, the Trapps' family physician, revealed a severely dehydrated child who was lethargic. The diagnosis was acute streptococcal pneumonia with severe dehydration. He was otherwise normal, but his condition was critical, life threatening. (ExhTr. 9-11) Dr. Coleberd thereupon notified the juvenile authorities because he "felt" that Robert was a neglected child. (ExhTr. 11-12, 22-23) Dr. Coleberd acknowledged that it is difficult for a lay person to distinguish dehydration as a sequela of pneumonia in its onset from less serious maladies, such as a chest cold or a fever of a relatively benign type (ExhTr. 15-16); that the dehydration could have had its onset as little as 24 to 48 hours before he saw the child (ExhTr. 18-19, 24-25); and that the dehydration could have been due to difficulty in swallowing because of a sore throat rather than any withholding of fluids (ExhTr. 27).

Dr. Coleberd saw the three younger children in December, 1972,

and found them in normal health and good condition. (ExhTr. 13-14, 17, 25-27)

On December 18, 1972, Mr. Edmonds received a complaint from the prosecuting attorney in connection with the hospitalization of Robert on December 15, 1972. (ExhTr. 43) On December 19, 1972, after the juvenile officer had submitted the petition and a temporary order placing the children in the care and custody of the Division of Welfare, Mr. Edmonds went out to the home to check on the situation as to the other three children. (ExhTr. 43, 51) Mrs. Trapp had moved and the home was now located in an isolated rural area east of Deepwater, Missouri, which was seven or eight miles from the hospital in Clinton. (ExhTr. 43, 48-49, 51) It was a two-room cabin which had formerly been used as a hunting lodge and had been acquired in condemnation proceedings by the Army Corps of Engineers in connection with the construction of the Truman Reservoir. (ExhTr. 49, 51) The roads were very bad at the time, and Mr. Edmonds had to borrow a jeep to get out there. (ExhTr. 45) The road conditions were such that you couldn't make it in an ordinary passenger car. (ExhTr. 48) Mrs. Trapp did not have a telephone and there were no close neighbors in the area. (ExhTr. 45, 49)

When Mr. Edmonds arrived at the home on December 19, 1972, he found Mrs. Trapp and the three younger children there. Although the three children [the oldest being age 3] were clothed in their underwear, the house was warm and there was plenty of firewood. There appeared to be plenty of food; "it was considerably a better situation than the first time" when they lived in Montrose. (ExhTr. 45, 52) The three children were in good health and appeared to be well-fed, well-nourished, and clean. (ExhTr. 45, 65, 68) "Other than being maybe scantilly clothed," the children appeared to be receiving proper care. (ExhTr. 68) Mr. Edmonds recommended to Mrs. Trapp that she move from this isolated area and find a place in town which would be closer to medical facilities. (ExhTr. 45) Mr. Edmonds did not feel that the children were in any apparent danger, so he left them in the home with their mother. (ExhTr. 51)

Mrs. Trapp testified that she was unaware that Robert was suffering from pneumonia until the night she got out to take him to the

hospital when the road got good enough to drive out, and that she was unable to get out before that "because it was muddy and we had that ice, snow and everything." (ExhTr. 125)

Mr. Edmonds testified that both Mr. and Mrs. Trapp were unemployed at the time of the hearing on January 2, 1973, when Judge Journey entered the order of custody. (ExhTr. 47-48) Mr. Edmonds further testified that Mr. and Mrs. Trapp were still unemployed at the time of their "reconciliation" when they resumed living together on or about January 27, 1973, and it was not until after that, that they obtained employment. (ExhTr. 64-65, 73) He testified moreover that he discussed employment with both Mr. and Mrs. Trapp and had knowledge that Mrs. Trapp got a job at Wiley's Cafe and Mr. Trapp went to work for Meyerco in Clinton sometime in February, 1973. (ExhTr. 54-55)

On February 27, 1973, Judge Journey entered an order (Tr. 3-4) finding that the three youngest Trapp children "are deprived of proper financial support while in foster care due to the falsification of information on the part of the natural parents of said children;" ordering that the Trapp parents "who are gainfully employed," pay support for said children in the amount of $198.00 per month or $66.00 per child, commencing March 5, 1973, and that this amount be garnisheed from the wages of the parents through the Henry County Circuit Clerk; and directing the sheriff to serve the parents with a copy of said order. On March 5, 1973, a summons with the order attached was issued and delivered to the sheriff, and on March 14, 1973, he made return of service of the summons on Mr. and Mrs. Trapp. (Tr. 4a)

On March 16, 1973, Mr. and Mrs. Trapp filed a motion for rehearing (Tr. 4a-5) to regain custody of their children on the ground that they had met the terms of the custody order of January 2, 1973, that they were to be heard regarding the custody of their children at such time as they were gainfully employed and able to provide adequate food, clothing and shelter.

Also on March 16, 1973, execution was issued against Mr. and Mrs. Trapp under the support order of February 27, 1973, and their employers were subjected to garnishment proceedings returnable

April 16, 1973.

On March 26, 1973, Mr. and Mrs. Trapp offered evidence on their motion seeking custody of their children. The motion was denied notwithstanding recommendation by child welfare worker Fritts that custody be restored to Mr. and Mrs. Trapp.

On April 23, 1973, Mrs. Trapp's employer deposited $80.36 on garnishment of her wages, and the court ordered it paid to Henry County in reimbursement of monies paid out on behalf of the Trapp children. Judgment was rendered against Mr. Trapp's employer on its failure to respond to the execution and on May 23, 1973, $45.84 was paid into court. This sum was also ordered paid to Henry County in reimbursement of support monies paid for the Trapp children.

At the time of the garnishment, Mrs. Trapp was clearing less than $37.00 per week, and the $80.36 represented more than two weeks' wages. The $117.64 for which judgment was entered against Mr. Trapp's employer represented what he cleared every two weeks; however, only $45.84 was returned because that was all that was due him when his employment was terminated upon his arrest on April 16, 1973.

On April 14, 1973, Mr. and Mrs. Trapp were charged by information with the felony of stealing $86.00 from the Department of Welfare by deceit in falsely representing that Mr. Trapp was absent from the household when he actually was in the home, in order to obtain Aid to Dependent Children. Mr. Trapp was arraigned April 16, 1973, and was committed to jail to await trial in lieu of $1,000 bond. Mrs. Trapp likewise was arraigned and committed to jail on April 27, 1973.

On May 18, the charge was reduced to the misdemeanor of stealing under $50.00. Both Mr. and Mrs. Trapp pleaded guilty, were sentenced to a year in the Henry County jail and placed on probation for two years conditioned upon good behavior and payment of costs (including room and board while in jail) within six months and payment of $474.00 to the Department of Welfare within one year. Upon their release, Mr. and Mrs. Trapp went to the Henry County Welfare Office, reported the terms of their probation, and renewed their request for the return of their children.

In June, 1973, Mr. Trapp went to work for Royal Transports in

Kansas City, Missouri, making $140 to $160 per week. On June 28, 1973, Mr. and Mrs. Trapp initiated an effort through the Jackson County Welfare Office to obtain return of their children. Their request was again denied because of Judge Journey's position that the judgment for child support and the monetary terms of their probation had to be satisfied in full before custody of the children would be returned to the parents.

As previously indicated, on January 3, 1974, the Henry County juvenile officer filed a petition in this case to terminate the parental rights of Mr. and Mrs. Trapp under §§211.441 et seq. RSMo 1969. Trial was held on April 29, 1974, and thereupon Judge Journey entered a judgment terminating their parental rights. The parents appealed and the Missouri Court of Appeals, Western District, reversed the judgment on September 2, 1975, in In re Trapp, supra, 528 S.W.2d 489 (Mo.App. 1975).

During pendency of the appeal, in July of 1974 the Henry County Office of the Division of Family Services placed the child, Sheryl Ann Trapp, in the licensed foster home of David L. and Judy E. Bridgeman. On October 8, 1974, the Bridgemans filed a petition for adoption of Sheryl Ann in case No. J-1847 in the Circuit Court of Henry County, Missouri, and on October 15, 1974, Judge Journey entered an order granting them temporary legal custody pursuant to that petition.

Likewise during pendency of the appeal, on October 15, 1974, Judge Journey also entered an order granting temporary legal custody of the child, Dee Ann Trapp, to Joseph W. and Lois A. Petty pursuant to their petition for adoption in case No. J-1848 in the Circuit Court of Henry County, Missouri; and then on December 16, 1974, Judge Journey entered an order granting temporary legal custody of the child, Duane Edwin Trapp, to Ronald D. and Carol J. Johnson pursuant to their petition for adoption in case No. 74-335J in the Circuit Court of Bates County, Missouri.

On October 28, 1975, after the decision in In re Trapp, supra, came down, Judge Journey entered an order in this case returning the care, custody and control of the fourth child, Robert Emery Trapp, to his parents "in view of the opinion of the Missouri Court of Appeals

[in said case];" but requesting the Missouri Division of Family Services to make a home study of the parents as to the return of the three remaining children whom he had preliminarily placed in adoption. (Tr. 5-6)

On December 27, 1975, the Trapp parents filed a motion to set aside the custody order of January 2, 1973, and the support order of February 27, 1973, or in the alternative for a hearing to restore custody of the three remaining children to the parents. (Tr. 6-10)

Thereafter, the Trapp parents moved to vacate the proceedings in each of the three pending adoption cases. On April 12, 1976, Judge Journey set aside the proceedings by Ronald D. and Carol J. Johnson for the adoption of Duane Edwin Trapp in case No. 74-335J in the Circuit Court of Bates County, transferred jurisdiction of said child back to the Circuit Court of Henry County, and revested legal custody in the Henry County Office of the Division of Family Services under the custody order of January 2, 1973, in this case. On April 26, 1976, Judge Journey set aside the proceedings by David L. and Judy E. Bridgeman for the adoption of Sheryl Ann Trapp and the proceedings by Joseph W. and Lois A. Petty for the adoption of Dee Ann Trapp in cases No. J-1847 and No. J-1848, respectively, in the Circuit Court of Henry County, and revested legal custody of said children in the Henry County Office of the Division of Family Services under the order of January 2, 1973, in the instant case. The Bridgemans, the Pettys, and the Johnsons have taken no appeal from the judgments dismissing their respective petitions for adoption.

On April 27, 1976, the Bridgemans filed in this case a motion for leave to intervene accompanied by proposed petition to intervene which included a prayer for termination of parental rights to Sheryl Ann Trapp. This Bridgeman motion was granted ex parte on April 28, 1976.

On April 29, 1976, the Trapp parents filed an application for change of judge on their motion (filed herein on December 27, 1975) to set aside the custody order of January 2, 1973, and the support order of February 27, 1973; and on May 28, 1976, Judge Journey granted the application. On June 1, 1976, the Missouri Supreme Court assigned Judge H. A. Kelso, of the Vernon County Circuit Court at Nevada,

Missouri, in place of Judge Journey in the Circuit Court of Henry County at Clinton, Missouri.

On June 15, 1976, the Trapp parents moved to set aside the ex parte order granting the Bridgemans leave to intervene and for a new order denying the intervention. On February 7, 1977, the Bridgemans filed a new motion to intervene accompanied by a petition to intervene which, unlike their first petition, did not seek the termination of parental rights. On February 22, 1977, Judge Kelso having retired, the Missouri Supreme Court returned the jurisdiction of the case to Judge Harold A. Kyser, who had succeeded Judge Journey in the Circuit Court of Henry County. On February 25, 1977, Judge Kyser granted the petition of the Bridgemans to intervene.

Following this, on April 29, 1977, the Henry County juvenile officer filed in this case a new petition to terminate parental rights to the child, Sheryl Ann Trapp. In response thereto, appellant filed an application for change of judge which Judge Kyser denied on June 10, 1977. Pursuant to a petition for writ of prohibition, change of judge on the termination petition was granted appellant by the Missouri Court of Appeals, Western District, on January 30, 1978, in State ex rel. Brault v. Kyser, 562 S.W.2d 172 (Mo.App. 1978). In due course the Missouri Supreme Court assigned Judge Don W. Kennedy of the Circuit Court of Vernon County to conduct the termination of parental rights proceeding in the Juvenile Court of Henry County.

On March 28, 1978, appellant filed herein a motion to dismiss the second petition to intervene, which the Bridgemans were given leave to file on February 25, 1977, on the grounds that notice was not properly given and that the juvenile court is without jurisdiction to entertain such a petition in this case.

On June 7, 1978, the Bridgemans filed their third motion to intervene in this case (Tr. 17-19). Therein they stated that the motion was being filed "for the purpose of clarifying the records and relieving the Appellate Court of the necessity of considering [the] matters [raised by appellant with respect to their previous interventions]." They then alleged that they are licensed foster parents and that Sheryl Ann Trapp resides with them in Phelps County, Missouri, by authority of the Henry County Office of the Division of

Family Services, which placed the child with them (in July of 1974); that they are "desirous" of adopting said child; and that they "have a direct and substantial interest in this proceeding in that the Court's ruling herein could have the possible effect of terminating their right to petition for adoption of said child and to merely maintain said child in their home as a foster child."

On July 14, 1978, appellant filed suggestions in opposition to the Bridgemans' third motion to intervene (Tr. 19-20) on the ground, inter alia, that permitting the Bridgemans to intervene and their attorney to participate in this action would be inherently and fundamentally unfair, potentially prejudicial, and contray to public policy.

On March 31, 1978, appellant filed in the termination proceeding before Judge Kennedy a motion to dismiss the petition to terminate parental rights to Sheryl Ann Trapp on the grounds that the juvenile court has no jurisdiction to proceed thereon because at the time of the filing of the petition on April 29, 1977, Sheryl Ann was neither a resident of nor found within Henry County as required by §211.031 RSMo, and the court's order of January 2, 1973, making said child a ward of the court and placing her in the legal custody of the Henry County Office of the Division of Family Services is null and void for want of jurisdiction for reasons which are alleged by appellant in the instant neglect proceeding before Judge Kyser.

On May 22, 1978, appellant filed in the neglect proceeding before Judge Kyser a motion to set aside the custody order of January 2, 1973, and to dismiss the neglect petition (Tr. 10-14); and on May 30, 1978, a motion to set aside the child support order of February 27, 1973 (Tr. 15-17).

In the motion filed on May 22, 1978, to set aside the custody order of January 2, 1973, appellant alleged (Tr. 10-14) that said order is null and void for the reasons that the juvenile court was without jurisdiction to enter the order because:

> (A) The special, limited statutory jurisdiction of the juvenile court to enter such an order does not appear on the face of the record inasmuch as (1) the neglect petition on which the order was entered wholly failed to state "[t]he facts which

bring the child within the jurisdiction of the court," as required by §211.091 RSMo 1969, and (2) the court in said order wholly failed to "make a finding of fact upon which it exercise[d] its jurisdiction over the child," as required by §211.181 RSMo 1969;

(B) As disclosed in the opinion and the transcript on appeal in the related case of In re Trapp, 528 S.W.2d 489 (Mo. App. 1975), the custody order of January 2, 1973, was totally devoid of evidence to support any finding that the children were in need of care and treatment under §211.031 RSMo 1969, and said order therefore violated the Trapp parents' fundamental liberty or right to the immediate companionship, care, custody, and management of said children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and

(C) The statutes (§§211.031 and 211.181 RSMo 1969) on which the custody order of January 2, 1973, was based are unconstitutional on their face and as applied because [they violate the Due Process Clause of the Fourteenth Amendment as heretofore set forth (ante at 2-3) in the statement of the grounds on which the jurisdiction of this Court is invoked]; and said statutes are also unconstitutional as applied because they denied the Trapp parents procedural due process of law in that: (a) Pleading the mere language of §211.031 did not satisfy the notice requirement of due process that the neglect petition must contain the alleged factual basis for the proceeding as well as the legal standard authorizing the separation of the child from the parents; and (b) The standard of proof required was a mere preponderance of the evidence rather than at least "clear and convincing" evidence.

In her motion filed on May 30, 1978, to set aside the support order of February 27, 1973, appellant alleged (Tr. 15-17) that the support order is null and void for the reasons that the juvenile court was without jurisdiction under §211.241 RSMo 1969 (See App. E, p. 3) to enter said order because:

(A) The jurisdictionally prerequisite order of January 2, 1973, finding the children to be within the purview of the

provisions of §211.031, was null and void for the reasons set forth in appellant's motion (filed herein on May 22, 1978) to set aside said custody order of January 2, 1973;

(B) As appears on the face of the record, the juvenile court lacked the special, limited statutory jurisdiction necessary to enter the support order of February 27, 1973, inasmuch as (1) the Trapp parents neither voluntarily appeared, not were they summoned to appear, for said proceeding to inquire into their ability to support or to contribute to the support of said children, as required by §211.241(1) RSMo 1969, and (2) the court made no finding that the parents were able to support or to contribute to the support of said children, as required by §211.241(2) RSMo 1969; and

(C) As alleged in the motion which the Trapp parents filed herein on December 27, 1975 (Tr. 6-10 at 8), it is apparent on the face of the record that said support order is constitutionally invalid because it was made in excess of the court's jurisdiction and in a patently irregular manner in that it was entered without affording the parents notice and an opportunity for a prior hearing and it thereby deprived them of their property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Tr. 16)

On September 14, 1978, appellant served a notice (Tr. 20-21) calling up for hearing on September 25, 1978, all motions pending in the neglect proceeding before Judge Kyser, including the Bridgemans' third motion for leave to intervene filed herein on June 7, 1978 (Tr. 17-19); appellant's motion filed herein on December 27, 1975, to set aside the custody order of January 2, 1973, and the support order of February 27, 1973 (Tr. 6-10); her motion filed herein on May 22, 1978, to set aside said custody order and dismiss the neglect petition (Tr. 10-14); and her motion filed herein on May 30, 1978, to set aside the support order of February 27, 1973 (Tr. 15-17).

On September 25, 1978, a hearing was had on the motions (Tr. 22-60), and thereupon Judge Kyser entered a judgment and order granting the Bridgemans' third motion for leave to intervene and overruling all of appellant's motions herein (Tr. 59-61). The case was then

duly and timely appealed to the Supreme Court of Missouri.

The Questions presented herein, ante at 4-6, were presented and briefed in the Missouri Supreme Court as follows:

1. Question I and the subsidiary Questions I(A) and I(B) were presented and briefed as Point I and subsidiary Points I(C)(1) and I(C)(2) at pages 45 and 53 of Appellant's Brief.

2. Question II was presented and briefed under Points I(A)(1) and I(C)(3)(a) at pages 37 and 56 of Appellant's Brief.

3. Question III was presented and briefed as Point I(B) at page 43 of Appellant's Brief.

4. Question IV was presented and briefed under Points I(A)(2) and I(C)(3)(b) at pages 37 and 56 of Appellant's Brief.

5. Question V was presented and briefed as Point I(A)(2) at page 37 of Appellant's Brief.

6. Question VI was presented and briefed as Point II(A) at page 59 of Appellant's Brief.

7. Question VII was presented and briefed under Points II(B) and II(C) at pages 60 and 62 of Appellant's Brief.

In its opinion (Appendix A) the Missouri Supreme Court held: (1) That the standards for neglect in §211.031 RSMo are not unconstitutionally vague and overbroad, and that due process does not require the neglect statutes to embody the standard of harm urged by appellant; (2) That the neglect petition couched in the language of the statute satisfied the notice requirements of due process and was adequate to vest the juvenile court with jurisdiction to enter the custody order; (3) That the juvenile court's finding of neglect was not totally without evidentiary support so as to violate federal due process; (4) That due process does not require the State to prove alleged neglect by "clear and convincing" evidence rather than a mere preonderance of the evidence; and (5) That the finding of the juvenile court that the children were "neglected children within the meaning of the law and in need of care and protection," satisfied the requirements of due process as established in Kent v. United States, 383 U.S. 541 (1966) and in In re Gault, 387 U.S. 1 (1966).

The majority of the Missouri Supreme Court further held, over the dissent of three of the seven judges, that the child support

order entered on February 27, 1973, without further hearing after the custody proceeding at which appellant appeared on January 2, 1973, was valid and did not violate appellant's due process rights to notice and an opportunity to be heard before entry of the monetary support order against her.

In conclusion, the Missouri Supreme Court affirmed the juvenile court's order of September 25, 1978, overruling appellant's motions to set aside the custody order of January 2, 1973, and the support order of February 27, 1973. The Court reversed that portion of the juvenile court's order of September 25, 1978, granting the Bridgemans' motion to intervene in the custody proceedings, and further ordered Judge Kyser to enter an order disqualifying himself from presiding over further proceedings concerning the custody of appellant's children.

Thus, the validity of the Missouri neglect statutes are drawn in question on the ground of their being repugnant to the Constitution of the United States, and the decision of the Missouri Supreme Court is in favor of their validity so that the Supreme Court of the United States has jurisdiction of this appeal under 28 U.S.C. §1257(2).

THE QUESTIONS ARE SUBSTANTIAL

I.

THE MISSOURI PARENTAL NEGLECT STATUTES (§§211.031 and 211.181 RSMo 1969) ON WHICH THE JUVENILE COURT DEPENDED FOR ITS JURISDICTION TO ENTER THE CUSTODY ORDER OF JANUARY 2, 1973, AND THE CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY OPERATE TO PERMIT PARENTS TO BE DEPRIVED OF THEIR FUNDAMENTAL LIBERTY OR RIGHT TO THE IMMEDIATE COMPANIONSHIP, CARE, CUSTODY, AND MANAGEMENT OF THEIR MINOR CHILDREN IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT:

A. THE NEGLECT STANDARDS EMBODIED IN §211.031(1)(a,b,c) — "PROPER SUPPORT . . ., MEDICAL, SURGICAL OR OTHER CARE NECESSARY FOR [THE CHILD'S] WELL-BEING," "OTHERWISE WITHOUT PROPER CARE, CUSTODY OR SUPPORT," AND "BEHAVIOR, ENVIRONMENT OR ASSOCIATIONS . . . INJURIOUS TO [THE CHILD'S] WELFARE OR TO THE WELFARE OF OTHERS" — ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD BECAUSE: (1) THEY DO NOT GIVE FAIR WARNING OF THE PARENTAL CONDUCT PROSCRIBED; (2) THEY PERMIT

ARBITRARY AND DISCRIMINATORY SEPARATION OF THE CHILD FROM THE PARENTS; AND (3) THEY INHIBIT THE EXERCISE OF THE PARENTS' "LIBERTY" AND "PRIVACY" RIGHTS IN MAINTAINING THE INTEGRITY OF THEIR FAMILY AND REARING THEIR CHILDREN.

As the United States Supreme Court has made clear, the loss of a fundamental constitutional "liberty" or right is at stake in proceedings to deprive parents of the companionship, care, custody, and management of their minor children. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court announced that the "liberty" guaranteed by the Fourteenth Amendment "[w]ithout doubt, . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), the Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." In Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the Court noted that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. * * * And it is in recognition of this that these decisions [Meyer and Pierce] have respected the private realm of family life which the state cannot enter."

In May v. Anderson, 345 U.S. 528, 533 (1953), the Court denied full faith and credit to an ex parte custody decree, noting that the Fourteenth Amendment's liberty included a parent's "immediate right to the care, custody, management and companionship of . . . minor children." In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974), the Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

In Roe v. Wade, 410 U.S. 113, 152-153 (1973), the Court pointed out that a constitutional right of personal privacy extends to "activities relating to marriage, procreation, contraception, family relationships, and child rearing and education," and that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."

And the Court further expressed its belief that this right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." See also Carey v. Population Services International, 431 U.S. 678, 684-685 (1977); Zablocki v. Redhail, 434 U.S. 374, 384-385 (1978).

In Stanley v. Illinois, 405 U.S. 645, 652 (1972), the Court in considering the constitutional dimensions of an unwed father's right to the custody of his children, said:

> "The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' * * *
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> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential,' . . . 'basic civil rights of man' . . . and 'rights far more precious . . . than property rights' . . .. * * * The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment . . .." (Citations omitted.)

The inescapable conclusion from the foregoing is that the parent's right to the immediate companionship, care, custody, and management of his or her children is a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. See Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, 15-16 (S.D.Ia. 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F.Supp. 769, 778, 779 (M.D.Ala. 1976)(three judge court); Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1190 (S.D.Tex. 1977); Davis v. Paige, 442 F.Supp. 258, 261-262 (S.D.Fla. 1977). It is also apparent that the Fourteenth Amendment's deferential protection is not limited to permanent or final deprivations of that fundamental right such as result form proceedings to terminate parental rights. Indeed, in

Stanley v. Illinois, supra, 405 U.S. at 647, the Supreme Court rejected such a suggestion and held that such protection extended to a dependency proceeding in which the deprivation of the right to custody was temporary or nonfinal. In doing so, the Court observed that in the interim between the removal and the regaining of the custody of the children, the parent "suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation."

The same is true of a neglect proceeding such as the instant one. As pointed out in Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977): "[Such a proceeding is] concerned with the most essential and basic aspect of familial privacy — the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody, and management of his or her children,' Stanley v. Illinois, 405 U.S. 645, 651 (1972), and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent, Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977)."

It is well recognized that the State's removal of a child from the parent in a neglect proceeding is a drastic action. Roe v. Conn, supra, 417 F.Supp. at 778 n. 9; R. v. Superior Court, 19 Cal.App.3d 895, 97 Cal.Rptr. 158, 162-163 (1971). The loss which accompanies the State's action is quite grievous and substantial for both the child and the parent. The generally prevailing view is that most children have strong psychological attachments to their parents, and when those ties are broken by separation, the child suffers short-term trauma and pain and possibly long-term emotional damage. See the American Bar Association Juvenile Justice Standards Project's Standards Relating to Abuse and Neglect (1977), Commentary at 124.[1] Reciprocally, most parents view the loss of custody in such a proceeding as dire punishment. R. v. Superior

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[1] These Standards Relating to Abuse and Neglect were among seventeen volumes of Standards for Juvenile Justice approved by the American Bar Association's House of Delegates at its Mid-Year Meeting in 1979. See 48 U.S. Law Week 2527-2528.

Court, supra, 97 Cal. Rptr. at 162. In fact, such loss of the right to custody of one's child may be viewed as a sanction more severe than imprisonment. State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 144 (W.Va. 1974); Danforth v. State Department of Health and Welfare, 303 A.2d 794, 800 (Me. 1973). Indeed, it has been recognized that the right of a parent to the custody and companionship of his child is "more precious to many people than the right of life itself." In re Myricks, 85 Wash.2d 252, 533 P.2d 841, 842 (Banc 1975); In re Luscier, 84 Wash.2d 135, 524 P.2d 906, 908 (Banc 1974).

The theoretical "temporary" separation, moreover, may well prove to be quite prolonged. Under §211.041 RSMo 1969 (App. E, p. 1), the State may retain custody of the child until he reaches the age of 21; and while under §211.251 RSMo 1969 (App. E, p. 3) a parent may petition the juvenile court at any time for a modification of the custody order, the court may in its discretion deny the petition without even a hearing. Cf. Davis v. Paige, supra, 442 F.Supp. at 265. See also Smith v. Organization of Foster Families, 431 U.S. 816, 834-836 (1977).

In ruling that the neglect standards embodied in §211.031 RSMo 1969 are not unconstitutionally vague and overbroad, the Missouri Supreme Court (App. A, p. 11) followed the holding in Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 401 (Mo.App. 1959). It should be noted that the Caruthers court prefaced its holding with the statement that "since no crime has been charged . . . and since the purpose of the proceeding is . . . not to punish, the constitutional guarantees [against vagueness] in respect to criminal cases do not apply." 323 S.W.2d at 399-400. In effect the Caruthers court distinguished the proceedings in question here from criminal cases by use of what the United States Supreme Court in In re Gault, 387 U.S. 1, 50 (1967), called the "'civil' label-of-convenience which has been attached to juvenile proceedings." But, as the Supreme Court pointed out in In re Winship, 397 U.S. 358, 365 (1970), "Gault expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding." And as the Court declared in Breed v. Jones, 421 U.S. 519, 529 (1975), "it is clear under our cases that determining . . . the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew

the 'civil' label-of-inconvenience which has been attached to juvenile proceedings, and that 'the juvenile process . . . be candidly appraised.'"

Moreover, in Small Co. v. American Sugar Refining Co., 267 U.S. 233, 238-242 (1925), the Court held that the due process guarantee against vagueness applies with equal force to statutes in "civil" as well as "criminal" cases. Referring to criminal cases wherein the statutes were held void for vagueness, the Court said at 239: "The defendant [like the Caruthers court] attempts to distinguish those cases because they were criminal cases. But that is not an adequate distinction. The ground or principle of th[ose] decisions was not . . . applicable only to criminal prosecutions. It was not the criminal penalty which was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

In striking down a statute under which the defendant was assessed court costs of $230.95 after acquittal in Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966), the Court reiterated the point:

> "* * * Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statutes. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.
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> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. * * *" (Emphasis added.)

In other words, as the Court stated in Connally v. General Construction Co., 269 U.S. 385, 391 (1926), "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process

of law."

In Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), the Court set forth the elemental principles of the void-for-vagueness doctrine:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked.'"

The Supreme Court, moreover, has made it clear that the void-for-vagueness doctrine requires a greater degree of specificity where the statute threatens the exercise of a fundamental right. Rose v. Locke, 423 U.S. 48, 50 n. 3 (1975); Smith v. Goguen, 415 U.S. 566, 572-573 (1974). While the Court was speaking in the context of the First Amendment, the principle is equally applicable here. As heretofore seen, the Court has made it clear that it is a fundamental right which is affected by the parental neglect statutes. Indeed, the right to the custody of one's own children, free from unwarranted state interference, may be viewed as a right even more basic and precious to a parent than freedom of speech. In such a case, unlike in cases dealing with purely economic regulation, the question of vagueness must be determined from the statute "on its face" without

regard to the conduct to which it is applied. See Smith v. Goguen, supra, 415 U.S. at 573 n. 10. Compare United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963).

The neglect standards embodied in §211.031 RSMo 1969 (App. E, p. 1) — "proper support . . ., medical, surgical, or other care necessary for [the child's] well-being," "otherwise without proper care, custody or support," and "behavior, environment, or associations . . . injurious to [the child's] welfare or to the welfare of others" — are plainly susceptible to multifarious interpretations which prevent the ordinary person from knowing what conduct is prohibited, and afford state officials with so much discretion in their application that arbitrary and discriminatory deprivations of parental custody are inevitable.

What is meant by "proper care"? According to Webster's New International Dictionary, 2d Ed., the word "proper" may mean: "appropriate; suitable; right; fit; * * * correct; * * * conforming to the best usage ethically or socially." What then is proper care? Is it correct care? Fit care? Appropriate care? Care consistent with propriety? Is propriety to be determined ethically, socially, or economically? Or on the basis of morality? Or prosperity? Is the standard a maximum, a minimum, a mean, or an average? As held with respect to a neglect standard of "proper parental care," in Roe v. Conn, supra, 414 F.Supp. 769, 780: "Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague." And as held with respect to a standard of a "proper home," in Davis v. Smith, 583 S.W.2d 37, 43-44 (Ark.Sup. 1979), such a standard is unconstitutionally vague because it means one thing to one judge, something else to another, and something yet different to still another.

The same is true of the Missouri neglect standards of "care necessary for [the child's] well-being," and of an "environment . . . injurious to [the child's] welfare." Webster's Third New International

Dictionary defines the word "well-being" as "the state or condition of being well; a condition characterized by happiness, health or prosperity; moral or physical welfare." And it defines the word "welfare" as "the state of faring or doing well; thriving or successful progress in life; a state characterized esp. by good fortune, happiness, well-being, or prosperity; * * * a social optimum."

The Missouri standard of "care necessary for [the child's] well-being," is essentially the same as the Iowa parental termination standard of "necessary parental care and protection," which was struck down as unconstitutionally vague in Alsager v. District Court of Polk County, Iowa, supra, 406 F.Supp. at 17-21. The Missouri standard is also similar to the Alabama parental neglect standard that custody of the child may be taken when "its welfare requires," which was likewise struck down in Roe v. Conn, supra, 414 F.Supp. at 777-778.

The Missouri neglect standard of an "environment . . . injurious to [the child's] welfare," is also essentially the same as the Iowa standard of "[parental] conduct . . . detrimental to the physical or mental health or morals of a child," which was struck down as unconstitutionally vague in Alsager, supra, 406 F.Supp. at 17-21.

The question arises in this case as to when is a home an "environment . . . injurious to [the child's] welfare" under the Missouri statute. Is a substandard or otherwise inadequate home such an "environment"? If it is, then there are millions of American families whose children could potentially be adjudged neglected on that count. See 42 U.S.C.A. §§1441, 1441a of the National Housing Act. Is a home without running water such an "environment"? Is a home in an isolated rural area such an "environment"? If it is, then there are still a good number of parents who could lose custody of their children for that reason. Does this standard apply to parents who are unable to provide an adequate home because of their poverty? The Missouri Supreme Court here indicated that it does. (App. A, pp. 3-4, 10 n. 10) But such a view that parents may be deprived of their constitutionally protected right to custody of their children solely because of their indigency, is totally unprecedented and inconsistent with our tradition of administering justice

equally to the rich and to the poor. See the concurring opinions of Mr. Justice Powell and Mr. Justice Stevens in the case of Zablocki v. Redhail, supra, 434 U.S. at 402-403 and 404-405.

The Missouri Supreme Court suggests (App. A, p. 11) that the neglect standards are necessarily broad and imprecise because of the many ways in which the need of children for care may arise, but this contention is not well founded. Such vagueness not only should but can be cured by defining the grounds for state intervention in terms of specific harms to the child so as to permit the State to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them, as has been done in the ABA Standards Relating to Abuse and Neglect (ante at 23 n. 1).[2]

While the facial defect of vagueness in a statute can be cured

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[2] As pointed out in the Commentary to the ABA Standards Relating to Abuse and Neglect, supra, at 40-41:

"The present resort to vague, general statutes is unacceptable for a number of reasons. Most importantly, by failing to identify the specific harms which justify intervention, such laws increase the likelihood that decisions will be made to intervene in situations where the child will be harmed by intervention. It has become increasingly clear in recent years that coercive intervention can be harmful to children as well as helpful. * * * This is especially true when intervention leads to removal of the child from the home. * * * Therefore, it is necessary to provide specific guidelines to courts and social work agencies regarding those types of harm which justify intervention and that define the situations in which intervention is likely to be beneficial to the child.

"Moreover, vague laws facilitate arbitrary, and even discriminatory, intervention. Unless the bases for intervention are clearly defined, each social worker and judge can make his/her own value judgments about those harms which justify intervention. There is substantial evidence that such decisions sometimes involve imposing middle class values upon poor families without taking into account different cultural patterns of child rearing. Vague laws also result in unequal treatment of similarly situated persons. Again, it must be recognized that such arbitrary intervention not only is violative of basic values in our society, it may also be quite harmful to the children who are being 'protected.'

"Finally, all intervention involves value judgments about appropriate childrearing practices and value choices about where and how a child should grow up. Considering the seriousness of the decision to intervene, intervention should be permissible only where there is a clear-cut decision, openly and deliberately made by responsible political bodies, that the type of harm involved justifies intervention. Such value judgments should not be left to the individual tastes of hundreds of nonaccountable decisionmakers." (Citations omitted."

by judicial construction restricting the vague standards to constitutionally permissible bounds, the Missouri appellate courts have not undertaken to make any such restrictive construction. In the great majority of the decisions involving an application of the parental neglect standards, the Missouri courts have simply made a determination as to the substantiality of the evidence to support a finding based on those standards.

§211.031 RSMo 1969 is also unconstitutionally vague as applied. The statute did not give appellant fair warning that it prohibited her from permitting her small children to be dressed only in undershorts ~~shirts~~ while inside the house.[3] Or from living in a house without running water. Or from living in a two-room cabin on land that had been condemned. Or from living in an isolated rural area.

Thus, contrary to the opinion of the Missouri Supreme Court, the neglect standards embodied in §211.031 RSMo 1969, are unconstitutionally vague, both on their face and as applied, in that (1) they do not, and did not here, give fair warning of what parental conduct is proscribed; (2) they permit, and permitted here, arbitrary and discriminatory separation of the child from the parent; and (3) they inhibit parents from freely and fully exercising their fundamental "liberty" and "privacy" rights in maintaining the integrity of their family and rearing their children. See Alsager, supra, 406 F.Supp. at 21; Roe v. Conn, supra, 417 F.Supp. at 778-780. See also Alsager, supra, 545 F.2d 1137, 1138, where the Eighth Circuit Court of Appeals in affirming the decision of the District Court on other grounds (which will hereinafter be presented in the instant case), felt compelled to note that the vagueness and overbreadth attacks on the facial validity of such statutory standards are "serious ones," and that the placing of a limiting construction upon such provisions is "plainly desirable."

B. THE STATUTES (§§221.031 AND 211.181 RSMo) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY DENY SUBSTANTIVE DUE PROCESS IN THAT THEY DO NOT REQUIRE THE STATE TO BALANCE ITS

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[3] Compare Alsager, supra, 406 F.Supp. at 22, where the prohibited conduct of which the Iowa statute did not give the Alsager parents fair warning, including permitting their children to leave the house in cold weather without winter clothing on.

CHILD-PROTECTION INTEREST AGAINST THE STRONG COUNTERVAILING INTEREST OF THE PARENTS, TO WIT: (1) THE STATUTES DO NOT REQUIRE THE STATE TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE CHILD IS IMMINENTLY SUBJECT TO A SUBSTANTIAL RISK OF SUFFERING SERIOUS HARM DUE TO THE CULPABLE CONDUCT OF HIS PARENTS AND THAT MORE HARM IS LIKELY TO BEFALL THE CHILD BY BEING PERMITTED TO REMAIN WITH HIS PARENTS THAN BY BEING SEPARATED FROM THEM, SO AS TO GIVE THE STATE THE COMPELLING STATE INTEREST NECESSARY TO JUSTIFY DEPRIVING THE PARENTS OF THE FUNDAMENTAL RIGHT TO THE CUSTODY OF THEIR CHILDREN; AND (2) THE STATUTES ARE NOT NARROWLY TAILORED TO ACHIEVE ONLY THE STATE'S COMPELLING STATE INTEREST IN THAT THEY DO NOT REQUIRE THE STATE TO PURSUE LESS DRASTIC ALTERNATIVES, SUCH AS PROVIDING SUPERVISORY GUIDANCE TO THE PARENTS AND THE CHILD IN THE HOME, BEFORE RESORTING TO SEPARATION OF THE CHILD FROM THE PARENTS.

As heretofore seen, the interest of a parent in the companionship, care, custody, and management of his children is one of the most fundamental rights protected by the Constitution. As the Supreme Court pointed out in Roe v. Wade, 410 U.S. 113, 115 (1973): "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." Similarly, in Zablocki v. Redhail, supra, 434 U.S. 374, 388 (1978), the Court declared: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." In other words, a State "may abrogate such rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective." Roe v. Conn, supra, 417 F.Supp. at 779.

As held in Stanley v. Illinois, supra, 405 U.S. 645, 652 (1972), the interest of a parent in the companionship, care, custody, and management of his or her children "undeniably warrants deference and, absent a powerful countervailing interest, protection." Thus while the State has a legitimate interest in protecting children, that

interest must be balanced against the parents' strong countervailing interest in being able to raise their children in an environment free from unwarranted government interference. Alsager, supra, 406 F.Supp. at 22. Due process therefore requires the showing of a certain threshhold of harm to the child to give the State a "child-protection interest" compelling enough to justify the deprivation of parental custody. Id. at 22-23. "Without danger of immediate harm or threatened harm to the child, the State's interest in protecting the child is not sufficient to justify a removal of the child [from his parents]." Roe v. Conn, supra, 417 F.Supp. at 778. The State's burden is to show that the harm to which the child is subjected is real and substantial. Id. at 779. And to have an interest "compelling" enough to curtail the parents' rights, the State must show that more harm is likely to befall the child by remaining with his parents than by being separated from them. Alsager, supra, 406 F.Supp. at 24, aff'd, 545 F.2d 1137 (8th Cir. 1976).

The Missouri Supreme Court indicated (App. A, p. 10) that such a standard of harm is limited to permanent or final deprivations of custody such as result from proceedings to terminate parental rights. But in Roe v. Conn, supra, 417 F.Supp. at 777-778, the standard was applied in the context of a proceeding to temporarily remove the child from his parents, as well as a proceeding to terminate parental rights. So, too, in a neglect proceeding in Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1193-1194 (S.D.Tex. 1977), the three-judge court held that the State was required to show "by clear and convincing evidence" that the State's taking of custody "is necessary to protect the child from physical injury." The court did not strike down the Texas statute in this respect, however, because the statute allowed the State to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." The court held that such language represents a constitutionally adequate standard, and noted (Id. at 1192 n. 14) that the standard is far more acceptable than that of the Alabama statute which provided for taking custody of the child when "its welfare requires," and was found unconstitutional in Roe v. Conn, supra.

Moreover, as previously indicated (ante at 29), the ABA Standards

Relating to Abuse and Neglect, ante at 23, embody the standard that the State should be authorized to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them. (See Standards 1.1, 1.2, 1.3, and 2.1.)

The Missouri neglect statutes provide no such restrictive standard, and by the same token, require no threshhold of harm. On the contrary, §211.011 RSMo 1969 (App. E, p. 1) declares that the purpose of the Juvenile Courts Chapter "is to facilitate the care, protection, and discipline of children," and proceeds to speak in expansive terms of removal "to the end that each child coming within the jurisdiction of the juvenile court shall receive such care . . . as will conduce to the child's welfare and the best interests of the state." Thus, as this case demonstrates, the Missouri Act on its face permits the removal of a child from his parents without any showing that the child is suffering, or will be imminently subject to a substantial risk of suffering serious harm due to culpable conduct of his parents, if left with them.

As previously seen (ante at 8-10), the only harm being suffered by any of the four children at the time the petition was filed on December 19, 1972, was the streptococal pneumonia for which the oldest child was taken to the hospital by his mother on December 15, 1972. But there was no evidence that the pneumonia was due to his mother's neglect. The three younger children involved on this appeal were all found at the time to be in good health, well-fed, well-nourished and clean. The matter of changing the baby's formula which caused the illness for which he received out-patient medical attention on November 2, 1972, had obviously been corrected. There simply was no evidence of any risk of harm to which the three younger children, and the oldest child upon his release from the hospital, would be subjected if left with their mother.

Thus, the Missouri neglect statutes (§§211.031 and 211.181 RSMo) are unconstitutional on their face and as applied because they deny substantive due process in that they permit deprivations of parental custody without the showing of a level of harm sufficient to give

the State a "child-protection interest" compelling enough to justify such separations.

Furthermore, it is a familiar and basic principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964). In a series of decisions, the Supreme Court has held that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). "[T]he Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom." Aptheker, supra, 378 U.S. at 509.

Section 211.181 RSMo 1969 (App. E, pp. 2-3), however, does not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in their home, before resorting to separation of the child from the parents. See Roe v. Conn, supra, 417 F.Supp. at 779. See also Alsager, supra, 406 F.Supp. at 24 n. 19. The Missouri neglect statutes therefore "sweep too broadly" and again deny due process both on their face and as applied in the instant case.

II.

THE NEGLECT PETITION WAS WHOLLY INSUFFICIENT TO VEST THE JUVENILE COURT WITH JURISDICTION TO ENTER THE CUSTODY ORDER BECAUSE THE PETITION MERELY ALLEGED NEGLECT IN THE CONCLUSORY LANGUAGE OF §211.031 RSMo 1969 AND THUS VIOLATED THE REQUIREMENT OF §211.091 RSMo 1969 AND OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT SUCH A PETITION MUST SET FORTH THE ALLEGED FACTUAL BASIS FOR THE PROCEEDING.

As heretofore seen (ante at 6-7), the printed form neglect petition in this case merely alleged in the language of §211.031 RSMo 1969 that the parents "have neglected and refused to provide

proper support, . . . medical, surgical, or other care necessary for the well-being of said child," that said child "is otherwise without care, custody or support," and that "the behavior, environment or associations of the child are injurious to his welfare or to the welfare of others." As held in In re Gault, 387 U.S. 1, 31-33 (1967), a petition alleging in general conclusory terms that the child is "neglected, dependent or delinquent" does not satisfy the notice requirements of due process. In this regard, the Supreme Court stated, 387 U.S. at 33-34:

> " * * * Notice, to comply with due process requirements must be sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' * * * [Due process] require[s] that the child and his parents . . . be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given . . . sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described -- that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet." (Emphasis added.)

In other words, as the Court pointed out, 387 U.S. at 17 n. 22, "notice of issues" is one of the constitutional requirements of due process which apply in "civil" as well as "criminal" proceedings.[4]

It should be noted that Gault held that due process required that the above-described notice be given to the parents as well as the child in such a case; such notice was required to be given to the child because his freedom was involved, and to the parents

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[4] Another, but not the sole, notice requirement of due process in any case is that the form of the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover B. & Tr. Co., 339 U.S. 306, 314 (1950); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

because their right to custody of the child was at stake in the delinquency proceeding. The same parental right to custody is involved in a neglect proceeding. Indeed, the deprivation of parental custody which may be at stake in a neglect proceeding is as great as that which was at stake in Gault.[5] By the same token, the applicability of the holding of Gault with respect to the parents' due process right to adequate notice of the factual basis for the proceeding to deprive them of custody, cannot be denied on the ground that in Gault the child's freedom was at stake, while here it is not.

The rationale of the due process requirement that the petition must notify the parents of the factual basis for the proposed deprivation of parental custody, is well stated in City of Raytown v. Roach, 360 S.W.2d 741, 743 (Mo.App. 1966), with reference to the sufficiency of the complaint in a municipal ordinance prosecution: "The prime purpose of such a pleading (as can be said of the petition in any civil action) is to inform the defendant of the nature of the action lodged against him in order that he may defend against it. * * * He should not be required to guess at what he is to defend against or speculate as to the meaning of the allegations in the complaint [* * * nor have any] difficulty in determining what evidence would be admissible under them . . . ."

Measured against this notice requirement of due process, the petition here fails to pass constitutional muster. By no stretch of the imagination can the petition be construed to have notified appellant of any specific charge or factual situation she would need to prepare to defend against. The petition did not inform her of whether she would have to meet the general conclusory charge of: (1) neglect to provide proper support; or of (2) neglect to provide necessary medical care; or of (3) neglect to provide other (unspecified) care necessary for the children's well-being; or of (4, 5, 6) permitting the children to be otherwise without proper care, or custody, or support; or of (7, 8, 9) permitting the behavior, or the environment, or the associations of the children to be injurious

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[5] In a delinquency proceeding the parents may be deprived of the custody of the child until he reaches the age of 21 and becomes emancipated. See Gault, 387 U.S. at 36-37. In a neglect proceeding the juvenile court may retain jurisdiction of the child until he reaches the age of 21. See §211.041 RSMo 1969 (App. E, p. 1).

to their welfare or that of others.

Even if the petition had made clear which of these general charges were lodged against appellant, it would not have informed her of the specific issues of fact she would have to meet. This would plainly be true if, for example, the petition had clearly charged her with neglect to provide medical or other care necessary for the children's well-being, because the need for care "may arise in so many ways," Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 401 (Mo.App. 1959), and there are so "many diverse circumstances which give rise to a finding of neglect . . .." In re Neglected Child, 130 Vt. 525, 296 A.2d 250, 254 (1972).

Contrary to the view adopted by the Missouri Supreme Court (App. A, p. 7), such a general charge does not constitute an allegation of facts. As clearly recognized in Missouri Supreme Court Rule 114.01 V.A.M.R.,[6] such a charge constitutes a "standard of conduct," as distinguished from "the facts" which are the acts, including the time, place and manner thereof, which allegedly violate the standard of conduct. By the same token, the petition here did not "set forth plainly . . . [t]he facts which bring the child within the jurisdiction of the court," as required by §211.091(2) RSMo 1969 (App. E, p. 1).

Failing, as it did, to comply with the mandate of §211.091 and the due process requirement of notice of issues, the neglect petition was wholly insufficient to give the juvenile court jurisdiction to proceed to enter the custody order of January 2, 1973.

III.

THE CUSTODY ORDER OF JANUARY 2, 1973, IS CONSTITUTIONALLY INVALID AND VOID BECAUSE THERE WAS A TOTAL ABSENCE OF COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE JUVENILE COURT'S FINDING OF NEGLECT, AND SAID ORDER THEREFORE DEPRIVED APPELLANT OF HER FUNDAMENTAL RIGHT TO THE IMMEDIATE COMPANIONSHIP, CARE, CUSTODY, AND MANAGEMENT OF HER CHILDREN IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

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[6] Rule 114.01(b)(3) provides that the petition in a neglect proceeding "shall set forth plainly and concisely, with reasonable particularity . . . the facts which bring the juvenile within the jurisdiction of the juvenile court, including the date, place and manner of the acts and the law or standard of conduct, if any, allegedly violated by the acts."

As previously seen, it is clear that the right of a parent to the immediate companionship, care, custody, and management of his or her minor children is a fundamental "liberty" protected by the Due Process Clause of the Fourteenth Amendment. It is also well recognized that where a judgment depriving a person of liberty or property is totally devoid of evidentiary support, such a judgment is constitutionally invalid and void under the Due Process Clause and may be collaterally attacked. Thompson v. Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Cunha v. Brewer, 511 F.2d 894, 898[1-3] (8th Cir. 1975); Dupree v. Wyrick, 415 F.Supp. 168, 169[3] (E.D.Mo. 1976); Cobb v. Wyrick, 379 F.Supp. 1287, 1295[8,9] (W.D.Mo. 1974).

The evidence to which the Missouri Supreme Court refers in its opinion does not amount to even a scintilla of evidence that the children were suffering or were likely to suffer any harm as a result of neglect by the parents to provide medical or other care necessary for the children's well-being or of the environment maintained by the parents. The State's own evidence discloses that there was no neglect to provide necessary care: Dr. Coleberd testified that Mrs. Trapp brought the oldest child, Robert, to the hospital on December 15, 1972, to receive necessary treatment for the streptococcal pneumonia which he had contracted (ExhTr. 9), and Mr. Edmonds testified that she had sought medical attention for the illness of the youngest child, Duane, on November 2, 1972 (ExhTr. 36-37).

Mr. Edmond's testimony that the youngest child was diagnosed on November 2, 1972, as suffering from "dehydration" (ante at 8-9), does not give rise to any legitimate inference that the child's illness was due to the environment of the child or the neglect of the parents to provide necessary care. As pointed out by the medical authorities in Home Health Guide and Medical Encyclopedia (Home Library Press, 1960), pp. 49, 550: "Dehydration is a body state in which [there is a] loss of an abnormal quantity of water from the body. It may result from perspiration in warm weather or from disease. Fever, diarrhea, or excess urination cause excessive amounts of water to pass from the system." As to the youngest child's condition on November 2, 1972, Mr. Edmonds in his written report made in November, 1972, and introduced in evidence as an exhibit, stated: "Dr. Coleberd

was the physician who attended the child and it was his opinion that the child was sick because Mrs. Trapp had changed the [baby's] formula. It seems that the child would not keep anything on its stomach and also had some diarrhea. Dr. Coleberd made a prescription to correct this and instructed the mother to keep the child on one particular formula." The baby was not hospitalized but was returned home with his mother by Mr. Edmonds on the same day (ExhTr. 40-41). The problem with the formula was obviously corrected, for Dr. Coleberd testified that he saw the baby and the other two of the three younger children involved here in December 1972, and found them to be in normal health and good condition (ExhTr. 13-14, 17, 25-57), and Mr. Edmonds testified that the three younger children were in good health and appeared to be well-fed, well-nourished, and clean when he saw them on December 19, 1972, the day the neglect petition was filed (ExhTr. 45, 65, 68).

The evidence that the oldest child, Robert, was suffering from acute streptococcal pneumonia in both lung fields (ante at 9) likewise fails to give rise to any legitimate inference that his condition was due to the environment maintained by the parents or any neglect by them to provide necessary care.[7] Contrary to the popular misconception, pneumonia is not caused by exposure to cold. As pointed out in Home Health Guide and Medical Encyclopedia, supra, at pp. 196-197:

> "Pneumonia is an infection of the air spaces of the lungs. There are many different types . . .. Lobar pneumonia is a type caused by pneumococcal bacteria, hemolytic streptococci, and occasionally by Friedlander's bacillus. It is characterized by involvement of one or more entire lobes of the lungs. * * * Pneumonia may also be caused by a variety of other organisms and conditions — tularemia, rheumatic fever, fungi, foreign bodies in the lungs or bronchial tubes, aspiration of mucous or pus, or other materials from the throat — or by nearly any other

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[7] Contrary to the view indicated by the Missouri Supreme Court (App. A, p. 10 n. 10), it is not enough that the child is suffering serious harm; that harm must also be due to the culpable conduct of the parents. Obviously, the fact that a child is suffering a life-threatening illness is not in itself reason for the State to take the child from his parents.

type of bacteria that gains a foothold through lowered resistance in the patient. * * * Lowered resistance due to any cause may lay the groundwork for the development of pneumonia." Moreover, Mr. Edmonds testified that, unlike the house in which the children were living in November, the hunting cabin in which they were living in December when Robert contracted pneumonia was warm inside; "it was considerably a better situation . . .." (ExhTr. 45) And of further significance is the fact that the other three children, who were living in the same environment under the same parental care, not only had not contracted pneumonia but were admittedly in good health and appeared to be well-fed, well-nourished, and clean.

Thus it appears that there was a total absence of substantial evidence to support any finding that the three younger children involved here, and the oldest child upon his release from the hospital, were or would be subjected to any risk of harm, if left with their parents. The custody order of January 2, 1973, is therefore constitutionally invalid and void under the Due Process Clause of the Fourteenth Amendment.

IV.

APPELLANT WAS DEPRIVED OF HER FUNDAMENTAL RIGHT TO THE CUSTODY OF HER CHILDREN WITHOUT PROCEDURAL DUE PROCESS OF LAW IN THAT THE STANDARD OF PROOF OF ALLEGED NEGLECT REQUIRED BY THE STATUTES (§211.031 and 211.181 RSMo 1969) WAS A MERE PREPONDERANCE OF THE EVIDENCE RATHER THAN AT LEAST "CLEAR AND CONVINCING" EVIDENCE.

Although proof by clear and convincing evidence is required in proceedings to terminate parental rights under §§211.441 et seq., RSMo 1969, no such requirement is found in §§211.031 and 211.181 RSMo 1969, or the reported cases dealing with the latter sections. In other words, the standard of proof required under the Missouri neglect statutes is proof by a mere preponderance of the evidence.

In its opinion (App. A, p. 10), the Missouri Supreme Court took the position that the "clear and convincing" standard of proof is not required as a matter of due process in a neglect proceeding. But as held in Sims v. State Dept. of Public Welfare, supra, 438 F.Supp. at 1194, and Alsager v. District Court of Polk County, Iowa, supra, 406 F.Supp. at 25, where the fundamental right of a parent to the

custody of his child is at stake in either a neglect or a termination proceeding, due process of law requires at the very least that the State prove its case by "clear and convincing" evidence.

Standard 6.4C.2. of the ABA Standards Relating to Abuse and Neglect (ante at 23) provides for the "clear and convincing" standard of proof in proceedings to remove the child from his parents. The applicability of this standard of proof to a neglect proceeding is further supported by the reasoning and the holding of the Supreme Court in Addington v. Texas, 441 U.S. 418 (1979). In that case, the Court held that due process requires such a standard of proof in civil commitment proceedings because the possible injury to the individual is significantly greater than any possible harm to the state. The Court furthermore pointed out that the "clear and convincing" standard has been applied in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing, in order to reduce the risk to the defendant of having his reputation tarnished erroneously.

By the same token, appellant was deprived of her fundamental right to the custody of her children without procedural due process of law in that the State was not required to prove the alleged neglect by clear and convincing evidence.

V.

THE JUVENILE COURT'S FINDING IN THE CUSTODY ORDER THAT APPELLANT'S CHILDREN "ARE NEGLECTED CHILDREN WITHIN THE MEANING OF THE LAW AND IN NEED OF CARE AND PROTECTION," DOES NOT SATISFY THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT THAT THE JUVENILE COURT MUST ACCOMPANY ITS ORDER WITH A STATEMENT OF THE REASONS OR CONSIDERATIONS THEREFOR, AND SET FORTH THE BASIS FOR THE ORDER WITH SUFFICIENT SPECIFICITY TO PERMIT MEANINGFUL REVIEW.

As heretofore seen (ante at 6-7), the neglect petition alleged in the language of §211.031(1) RSMo 1969 (App. E, p. 1) that appellant had violated the provisions of subdivisions (a), (b), and (c) thereof. Section 211.181 RSMo 1969 (App. E, p. 2) provides that "When a child is found by the court to come within the provisions of section 211.031, the court shall so decree and make a finding of of fact upon which it exercises its jurisdiction over the child . . .." In its custody order of January 2, 1973 (ante at 7), the

juvenile court merely made a finding that the children herein "are neglected children within the meaning of the law and are in need of care and protection."

Such a finding wholly fails to indicate not only what acts appellant was found to have committed but which provisions of the statute she was found to have violated. And yet, as heretofore seen (ante at 23-24), the loss which accompanies the custody order is quite grievous and substantial. Such being the case, due process requires that the juvenile court accompany the order with a statement of the reasons or considerations therefor, and set forth the basis for the order with sufficient specificity to permit meaningful review. Kent v. United States, 383 U.S. 541, 561 (1966). Contrary to the Missouri Supreme Court's opinion (App. A, p. 8), the juvenile court's finding did not satisfy that requirement.

VI.

THE JUVENILE COURT'S CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, IS INVALID AND VOID BECAUSE THE COURT WAS WITHOUT JURISDICTION TO ENTER THE ORDER UNDER §211.241 RSMo 1969 BECAUSE THE JURISDICTIONALLY PREREQUISITE CUSTODY ORDER OF JANUARY 2, 1973, FINDING THE CHILDREN TO BE WITHIN THE PURVIEW OF THE PROVISIONS OF §211.031 RSMo 1969, WAS NULL AND VOID FOR THE REASONS SET FORTH UNDER QUESTIONS I(A) AND I(B) AFORESAID.

The jurisdiction of the juvenile court to enter the support order of February 27, 1973, is derived from and confined to the authority given by §211.241 RSMo 1969 (App. E, p. 3). In pertinent part, §211.241 provides: "When the juvenile court finds a child to be within the purview of the applicable provisions of Section 211.031 it may in the same or subsequent proceedings . . . proceed to inquire into the ability of the parent of the child to support it or to contribute to its support. * * * If the court finds that the parent is able to support the child or to contribute to its support, the court may enter an order requiring the parent to support the child or to contribute to its support . . .." (Emphasis added.)

Thus it appears that §211.241 authorizes the juvenile court to proceed to enter such a support order only after making a finding under §211.181 that the child comes within the provisions of §211.031.

In other words, the custody order of January 2, 1973, was a jurisdictional prerequisite for the juvenile court to enter the support order of February 27, 1973. And since the custody order of January 2, 1973, is null and void for the reasons set forth under Questions I(A) and I(B) aforesaid, the support order of February 27, 1973, is invalid and void.

VII.

THE CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, IS INVALID BECAUSE IT WAS ENTERED WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF A MONETARY JUDGMENT FOR SUPPORT OF THE CHILDREN, AND IT THUS DEPRIVED APPELLANT OF HER PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As previously indicated, this point is supported by Chief Justice Bardgett in his dissenting opinion (App. A, pp. 14-16), which was concurred with in the separate opinions of Judges Seiler and Higgins (App. A, p. 16).

The original neglect petition was served upon appellant but not upon her husband, Mr. Trapp. The petition merely sought to have the juvenile court take jurisdiction of the children on the ground that they were neglected, and it contained no claim against appellant for child support.

Appellant personally appeared at the hearing on January 2, 1973, and thereupon the juvenile court entered the custody order (ante at 7) making the children wards of the court. The custody order made no reference whatsoever to the matter of child support.

The record further shows that on February 27, 1973, without any prior notice to Mr. and Mrs. Trapp and without their being personally present, the juvenile court entered an order directing that Mr. and Mrs. Trapp "who are gainfully employed," pay support for said children in the amount of $198.00 per month or $66.00 per child. (See App. A, p. 15.)

The majority of the Missouri Supreme Court (App. A, p. 9) relied on the provision of §211.241(1) RSMo 1969 (App. E, p. 3) authorizing the juvenile court to inquire into the parents' ability to make support payments either in the initial custody proceedings or in subsequent proceedings, and the majority assumed in the

absence of a transcript, that such an inquiry was made at the hearing on January 2, 1973. But in doing so, the majority overlooked the fact that although the juvenile court may have such authority, there is still the due process matter of notice to the parents.

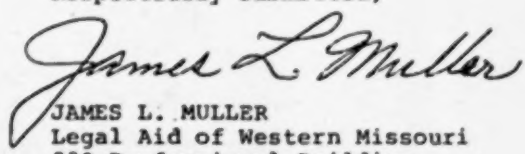
As held in Reynolds v. Stockton, 140 U.S. 254, 270-271 (1891), it is a well settled proposition "that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must . . . be responsive to the issues tendered by the pleadings. In other words, . . . when a complaint tenders one cause of action, and in that suit service on, or appearnce of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force . . .." Indeed, "A judgment upon a matter outside of the issue [tendered must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated." Id. at 268-269. Cf. Windsor v. McVeigh, 93 U.S. 274 (1876). See also Chief Justice Bardgett's dissenting opinion herein (App. A, pp. 14-16).

It follows that the child support order of February 27, 1973, is invalid because it was entered without notice and an opportunity to be heard on the issue of a monetary judgment for support of the children, and it thus deprived appellant of her property in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for plenary briefing and argument.

Respectfully submitted,



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